No. 49636-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK IPPOLITO

Appellant,

v.

LEAH AND "JOHN DOE" HENDERSON,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY

THE HONORABLE SUSAN SERKO

OPENING BRIEF OF APPELLANT

Sean P. Wickens
Wickens Law Group, P.S.
602 S. Yakima
Tacoma, Washington 98405
(253) 383-4200

Attorney for Appellant
Mark Ippolito

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in denying Plaintiff's pretrial motion for nonsuit pursuant to CR 41(a)(1)(B) where Plaintiff had timely requested a trial *de novo* following mandatory arbitration.

2. The trial court erred in holding that a plaintiff is precluded from requesting a pretrial nonsuit pursuant to CR 41(a)(1)(B), where plaintiff has timely requested a trial *de novo* following mandatory arbitration.

3. The trial court erred in finding that the Court of Appeals decision in *Thomas-Kerr v. Brown*[1] precludes a plaintiff from requesting a pretrial nonsuit pursuant to CR 41(a)(1)(B), where plaintiff has timely requested a trial *de novo* following mandatory arbitration.

B. Issues Pertaining to Assignments of Error

1. Did the Court of Appeals decision in *Thomas-Kerr v. Brown* reverse its prior decisions in *Walji v. Candyco, Inc.*[2], and *Nguyen v. Glendale Construction Co., Inc.*[3],where the

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[1] 114 Wn.App. 554, 59 P.3d 120 (2002).
[2] 57 Wn.App. 284, 787 P.2d 946 (1990).
[3] 56 Wn.App. 196, 782 P.2d 1110 (1989).

Thomas-Kerr decision did not reference the *Walji* or *Nguyen* decisions and did not reach the same issues as *Walji* and *Nguyen*?

2. Does the Court's decision in *Thomas-Kerr* preclude plaintiffs whose cases are subject to mandatory arbitration pursuant to RCW 7.06 *et seq.*, from requesting a pretrial nonsuit pursuant to CR 41(a)(1)(B) after requesting a trial *de novo*, where prior decisions of the same Court, e.g., *Walji* and *Nguyen*, have clearly permitted plaintiffs appealing from a mandatory arbitration award to nonsuit their cases prior to trial pursuant to CR 41(a)(1)(B)?

3. If the trial court's ruling was affirmed would that mean that a plaintiff would only be allowed to file for nonsuit under CR 41(a)(1)(B) following arbitration when a request for trial *de novo* was filed by the defendant, but not when the request for trial *de novo* was filed by the plaintiff?

4. Does the fact that the Court of Appeals has repeatedly held that the attorney fees provision of MAR 7.3 applies whether an appealing plaintiff withdraws the request for trial *de novo* or

voluntarily dismisses pursuant to CR 41(a)(1)(B)[4], indicate that an appealing plaintiff is allowed to obtain a pretrial nonsuit pursuant to CR 41(a)(1)(B) after appealing from an arbitration award?

II. STANDARD OF REVIEW

Application of a court rule to the facts is a question of law subject to *de novo* review on appeal. ***Wiley v. Rehak,*** 143 Wn.2d 339, 20 P.3d 404 (2001).

III. STATEMENT OF THE CASE

On January 28, 2014, Mark Ippolito was involved in a motor vehicle accident with Leah Henderson in Tacoma, Washington. Mr. Ippolito suffered bodily injuries as a result of this collision. CP 1-4

On September 12, 2014, Mr. Ippolito filed suit against Ms. Henderson in Pierce County Superior Court. CP 1-6

On January 23, 2015, Mr. Ippolito submitted the matter to mandatory arbitration as required by RCW 7.06 *et seq.* (Appendix #2)

On August 31, 2015, Mr. Ippolito timely filed and served a request for

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[4] ***Walji v. Candyco, Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990); *Nguyen v. Glendale Construction Co., Inc.*, 56 Wn.App. 196, 782 P.2d 1110 (1989).**

a trial *de novo* of the mandatory arbitration award. (Appendix #3)

On September 12, 2016, Mr. Ippolito timely filed and served a motion for voluntary nonsuit pursuant to CR 41(a)(1)(B). In support of this motion, Mr. Ippolito also referred the trial court to the Court of Appeals decision in *Walji v. Candyco*[5]. CP 7-8

On September 15, 2016, Ms. Henderson filed a Response to Mr. Ippolito's motion for nonsuit in which Ms. Henderson argued that Mr. Ippolito's pretrial motion for nonsuit should be denied pursuant to the Court of Appeals decision in *Thomas-Kerr v. Brown*[6] as follows:

> **Here, however, the plaintiff filed a *de novo* appeal following entry of an arbitration award in Defendant's favor. As Division I of our Court of Appeals has succinctly ruled in *Thomas-Kerr v. Brown*, 114 Wn.App. 554, 59 P.3d 120 (2002), plaintiff may no longer obtain a voluntary dismissal under CR 41.**
>
> CP 9-13

On September 16, 2016, Mr. Ippolito filed a Reply to Ms. Henderson's response in which Mr. Ippolito disputed Ms. Henderson's interpretation of the *Thomas-Kerr* decision. CP 14-18 In his response, Mr. Ippolito pointed out that in the *Thomas-Kerr* decision, defendant Brown had filed a request for trial *de novo* of an arbitration award, but plaintiff Thomas-Kerr had not requested a trial *de novo* of the award. CP 15-16 Mr.

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[5] *Id.*
[6] *Id.*

Ippolito's Reply brief further pointed out that the defendant in *Thomas-Kerr* (Brown) withdrew his request for trial *de novo* unilaterally prior to trial and the trial court then ordered that the arbitration award was final because plaintiff Thomas-Kerr had not timely requested a trial *de novo* of the arbitration award. CP 15-16

On September 19, 2016, the trial court in the present matter denied Mr. Ippolito's motion for pretrial voluntary nonsuit pursuant to CR 41 (a)(1)(B) and further ordered that Mr. Ippolito was required to either go to trial on September 21, 2016, or withdraw his request for trial *de novo*. CP 19

On September 21, 2016, a bench trial was held at which Mr. Ippolito rested without presenting evidence. CP 21

On October 21, 2016, the trial court herein signed Findings of Fact and Conclusions of Law in which the trial court held, *inter alia*, that "*Thomas-Kerr v. Brown*, 114 Wn.App. 554, 59 P.3d 120 (2002) controlled over CR 41(a)(1)(B) and that plaintiff's remedy was a withdrawal of his trial *de novo* request." CP 21

On November 3, 2016, Mr. Ippolito filed a Notice of Appeal herein of the trial court's denial of his Motion for Voluntary Nonsuit, and the subsequent judgment and award of fees and costs following trial. CP 25-34

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING MR. IPPOLITO'S MOTION FOR VOLUNTARY NONSUIT UNDER *THOMAS-KERR V. BROWN* WHERE MR. IPPOLITO HAD FILED A TIMELY REQUEST FOR TRIAL *DE NOVO* AND WAS, THEREFORE, NOT BOUND BY THE REQUIREMENTS OF MAR 6.3, AS WAS THE PLAINTIFF IN *THOMAS-KERR V. BROWN.*

In the present matter, the trial court based its decision entirely upon the Division I decision in *Thomas-Kerr v. Brown*[7]. CP 19, 21 The trial court herein, erroneously believed that the *Thomas-Kerr* opinion precluded all plaintiffs from requesting pretrial voluntary dismissal pursuant to CR 41 (a)(1)(B) if they requested a trial *de novo* of the mandatory arbitration award under RCW 7.06, *et seq.* However, that is not what the Court held in *Thomas-Kerr*. Rather, what the Court held in *Thomas-Kerr* is that a plaintiff who fails to appeal an arbitration award is bound by that award, pursuant to MAR 6.3, when the appealing defendant unilaterally withdraws its request for trial *de novo* prior to trial.

In the present matter, unlike the plaintiff in *Thomas-Kerr*, Mr. Ippolito filed a timely request for trial *de novo* of the arbitration award. (Appendix #2) Therefore, Mr. Ippolito was not subject to the limitations of MAR 6.3, entitled "Judgment on Award", which only applies when an arbitrator's award has resulted in a judgment.

The present matter is more akin to the *Walji* case in which the Court noted that:

> **"There is no meaningful difference between withdrawing an appeal and taking a voluntary nonsuit."[8]**

In *Walji*, the facts were set out by the Court as follows:

> **Plaintiff requested trial de novo after it lost mandatory arbitration. At trial de novo plaintiff took voluntary nonsuit, and the Superior Court, King County, Edward Heavy, J., entered judgment requiring plaintiff to pay attorneys fees to defendant.[9]**

In the present matter, as in *Walji*, Mr. Ippolito requested a trial *de novo* following mandatory arbitration. Then, as in *Walji*, Mr. Ippolito filed a motion for voluntary nonsuit pursuant to CR 41 (a)(1)(B) prior to trial. The trial court in *Walji* denied the plaintiff's motion for nonsuit under CR 41(a)(1)(B), but allowed the plaintiff to take a nonsuit under CR 41 (a)(2). The trial court in *Walji* opined that the plaintiff could not move for nonsuit pursuant to CR 41(a)(1)(B) after requesting a trial de novo of the arbitration award.

In rejecting the trial court's analysis in *Walji*, the Court of Appeals agreed with the plaintiff that "a 'trial de novo' under the mandatory arbitration statute, RCW 7.06.050, is conducted as if no arbitration had

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[7] *Id.*
[8] Walji, at 290 (citing Nguyen v. Glendale Construction Co., Inc., 56 Wn.App. 196, 206-208, 782 P.2d 1110 (1989).
[9] *Walji*, at 284.

occurred." The Court of Appeals further agreed with the plaintiff that the plaintiff had a right to a voluntary nonsuit pursuant to CR 41(a)(1)(B). However, the Court of Appeals in *Walji* found that the trial court's error was harmless because the court awarded attorney fees based on MAR 7.3, not on CR 41(a)(2).[10]

Finally, the Court in *Walji* specifically noted that the "award of attorney fees under MAR 7.3 after a voluntary nonsuit was within the discretion of the trial court" in the same way as an award of attorney fees following withdrawal of a request for trial *de novo*. Therefore, an award of attorney fees under MAR 7.3 applies equally to a motion for voluntary nonsuit following a request for trial de novo and a withdrawal of a request for trial de novo.

As the foregoing analysis illustrates, the trial court in the present matter erred in denying Mr. Ippolito's motion for nonsuit pursuant to CR 41(a)(1)(B).

B. THE TRIAL COURT'S RULING IS ERRONEOUS BECAUSE IT EFFECTIVLY HOLDS THAT THE *THOMAS-KERR* OPINION OVERTURNED THE *WALJI* AND *NGUYEN* DECISIONS, WHICH WAS NOT THE INTENT OF THE *THOMAS-KERR* OPINION.

As noted above, the Division I Court of Appeals has repeatedly held

[10] *Walji*, at 287.

[11]that a plaintiff who requests a trial *de novo* following mandatory arbitration, may voluntarily dismiss its case prior to trial pursuant to CR 41(a)(1)(B). (*See*, *Walji* and *Nguyen*)

The *Walji* and *Nguyen* decisions both predate the *Thomas-Kerr* decision and yet the Court in *Thomas-Kerr* makes no reference to either the *Walji* or *Nguyen* decisions. If the *Thomas-Kerr* court had intended to overturn its earlier decisions in *Walji* and *Nguyen*, then it would be expected that the *Thomas-Kerr* court would have referenced those earlier decisions. The fact that the *Thomas-Kerr* court did not reference its earlier decisions in *Walji* and *Nguyen* is a strong indication that the *Thomas-Kerr* court did not feel that its decision affected those earlier decisions.

Therefore, the trial court herein erred in holding that the Court of Appeals decision in *Thomas-Kerr v. Brown* precluded Mr. Ippolito from requesting voluntary dismissal in the present matter pursuant to CR 41(a)(1)(B).

V. CONCLUSION

Based on the foregoing, the Appellant respectfully requests that the Court of Appeals reverse the trial court's ruling denying Defendant's motion

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[11] *Walji v. Candyco, Inc.*, 57 Wn.App. 284 (1990); *Nguyen v. Glendale Construction Co., Inc.*, 56 Wn.App. 196, 782 P.2d 1110 (1989).

for voluntary nonsuit pursuant to CR 41(a)(1)(B), and remand this matter to the trial court for entry of a nonsuit pursuant to CR 41(a)(1)(B) effective September 19, 2016.

Dated this 7th day of February, 2017.

WICKENS LAW GROUP, P.S.

SEAN P. WICKENS, WSBA #24652
Attorney for Mark Ippolito

V. APPENDIX

1. Supplemental Designation of Clerk's Papers.
2. Note for Arbitration w/Fee.
3. Request for Trial De Novo and Seal Award w/Fee.

Appendix Item #1

Appendix Item #1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

MARK IPPOLITO, **Plaintiff,** **v.** **LEAH AND "JOHN DOE" HENDERSON** **Defendants.**	**No. 14-2-12429-1** **COA #49636-4-II SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS** **(CLERK'S ACTION REQUIRED)**

COMES NOW, Sean P. Wickens, the attorney for Mark Ippolito, pursuant RAP 9.6 and pursuant to the attached declaration hereby requests that the supplemental designated clerk's papers from these proceedings be prepared and forwarded to the Washington Court of Appeals, Division II.

SEAN P. WICKENS, WSBA #24652
Attorney for Mark Ippolito, Plaintiff/Appellant

COPY

DECLARATION

I, Sean P. Wickens, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct to the best of my knowledge:

I am the attorney for the above-named Plaintiff/Appellant in the present cause

WICKENS LAW GROUP, P.S.
602 S. Yakima
Tacoma, WA 98405
(253)383-4200; Fax (253)383-4202

number. The Plaintiff/Appellant has filed an appeal which is based on meritorious grounds.

I hereby request that the Pierce County Court Clerk prepare and deliver the following supplemental clerk's papers to the Court of Appeals, Division II:

1. **Note for Arbitration w/Fee.**
2. **Request for Trial De Novo and Seal Award w/Fee.**

DATED this 7th day of February, 2017.

WICKENS LAW GROUP, P.S.

SEAN P. WICKENS, WSBA #24652
Attorney for Mark Ippolito, Plaintiff/Appellant

WICKENS LAW GROUP, P.S.
602 S. Yakima
Tacoma, WA 98405
(253)383-4200; Fax (253)383-4202

Appendix Item #2

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

January 23 2015 9:07 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-2-12429-1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

MARK IPPOLITO

Plaintiff(s),

vs.

LEAH HENDERSON

Defendant(s)

NO. 14-2-12429-1

NOTE FOR ARBITRATION

CASE CATEGORY:

☐	COL	Collection	☐	MAL	Other Malpractice	☐	TMV	Tort Motor Vehicle
☐	COM	Commercial	☐	MED	Medical Malpractice	☐	TTO	Tort Other
☐	CON	Construction/Real Estate	☒	PIN	Personal Injury	☐	Other	
☐	DIS	Family Law	☐	PRP	Property Damage			

NAME: TYLER K. FIRKINS
ADDRESS: 721 45th St NE
AUBURN, WA 98002-1303
(253) 859-8899
Attorney for Plaintiff/Petitioner
WSB#: 20964

NAME: DAN L JOHNSON
ADDRESS: 520 Pike St Ste 1300
SEATTLE, WA 98101-4042
(206) 405-1900
Attorney for Defendant
WSB#: 24277

STATEMENT OF ARBITRABILITY

☒ This case is subject to arbitration because the sole relief sought is a money judgment and involves no claim in excess of Fifty Thousand Dollars ($50,000), exclusive of attorney fees, interest and costs.

☐ This case is not subject to mandatory arbitration because:
- ☐ Plaintiff's claim exceeds Fifty Thousand Dollars ($50,000).
- ☐ Plaintiff seeks relief other than a money judgment.
- ☐ Defendant's counter or cross claim exceeds Fifty Thousand Dollars ($50,000).
- ☐ Defendant's counter or cross claim seeks relief other than a money judgment.

☐ The undersigned contends that its claim exceeds Fifty Thousand Dollars ($50,000). But hereby waives any claim in excess of Fifty Thousand Dollars for the purpose of arbitration.

DATED: January 23, 2015

/s/ TYLER K. FIRKINS

Appendix Item #3

Appendix Item #3

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

August 31 2015 9:00 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-2-12429-1

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

IPPOLITO, MARK Plaintiff, vs. HENDERSON, LEAH Defendant.	No.: 14-2-12429-1 **REQUEST FOR TRIAL DE NOVO AND FOR SEALING OF ARBITRATION AWARD** ($RTDNSA)

PLEASE TAKE NOTICE that the aggrieved party IPPOLITO, MARK requests a Trial De Novo from the award filed on 8/21/2015.

1. A Trial De Novo is requested in this case pursuant to MAR 7.1 and PCLMAR7.1.
2. The Arbitration Award shall be sealed pursuant to MAR 7.2 and PCLMAR 7.2.
3. Pursuant to PCLMAR 7.1(a), a note for trial setting is being filed and served at the same time as the filing of this Request.

THE REQUEST FOR TRIAL DE NOVO SHALL NOT REFER TO THE AMOUNT OF THE AWARD.

Do not attach a copy of the award.

Dated: August 31, 2015

/s/ Jeffrey R Caffee
WSBA# 41774

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

MARK IPPOLITO,	)	
	)	
Appellant	)	**No. 49636-4-II**
	)	
v.	)	
	)	
	)	**DECLARATION OF**
LEAH and "JOHN DOE" HENDERSON,	)	**SERVICE**
	)	
	)	
Respondents	)	
	)	

I, Susana Samaniego, declare under the penalty of perjury of the Laws of the State of Washington that on this date I did send by Legal Messenger, a true and correct copy of the 1) Appellant's Opening Brief, and 2) Supplemental Designation of Clerk's Papers to Law Office of Shahin Karim at 520 Pike St., Ste 1300, Seattle, Washington 98101.

In addition, I also sent a true and correct copy of this same document by US Mail, postage pre-paid to the Appellant, Mark Ippolito at 3438 I ST NE #Q204, Auburn, Washington 98002.

DATED at Tacoma, Washington, this 7 day of February, 2017.

Susana Samaniego

Susana Samaniego, Legal Assistant